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DEFENSE WITNESS IMMUNITY—A “FRESH” LOOK AT THE COMPULSORY PROCESS CLAUSE

Howard Mattheson, armed with a sawed-off shotgun, entered the Hair-Wiz beauty salon accompanied by his wife. Mattheson immediately shot and killed the receptionist, and with the assistance of his wife, he began to search the customers' purses. When one woman refused, Mattheson shot the patron next to her in the leg. At the trial, defense counsel called Mattheson's wife to testify; she refused, invoking her fifth amendment¹ privilege against self-incrimination. Defense counsel asked that the jury be removed and requested the witness be granted use immunity in exchange for her testimony. The trial judge refused, and Mattheson was convicted of first-degree murder.² At the sentencing hearing,³ defense counsel repeated his request, which was again refused. The Louisiana Supreme Court affirmed the conviction and *held* that when a witness who is a prosecutorial target properly asserts his privilege against self-incrimination, claims for defense witness immunity are properly denied by the trial judge absent actual prejudice to the defendant. *State v. Mattheson*, 407 So. 2d 1150 (La. 1981).

The sixth amendment expressly guarantees the defendant in all criminal prosecutions the right “to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.”⁴ The confrontation clause⁵ secures an opportunity for the defendant physically to confront and cross-examine witnesses presented against him in a court of law.⁶ The compulsory process

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1. “No person . . . shall be compelled, in any criminal case, to be a witness against himself” U.S. CONST. amend. V.

2. “[T]he killing of a human being: (1) when the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery” CRIMINAL CODE: LA. R.S. 14:30 (1950 & Supp. 1979).

3. At the hearing, upon a unanimous recommendation by the jury, the defendant was sentenced to death by the trial judge. *State v. Mattheson*, 407 So. 2d 1150, 1155 (La. 1981).

4. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. CONST. amend. VI.

5. “[T]o be confronted with the witnesses against him.” U.S. CONST. amend. VI.

6. See Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974).

clause⁷ secures for the defendant "the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's."⁸ The confrontation and compulsory process clauses of the sixth amendment were made applicable to the states through the fourteenth amendment⁹ in *Porter v. Texas*¹⁰ and *Washington v. Texas*,¹¹ respectively. The two clauses differ in that the confrontation clause concerns itself with the procedures governing the manner in which the prosecution presents its case,¹² while the compulsory process clause deals with the defendant's affirmative personal right to present testimony in his favor.¹³

Traditionally, courts viewed the compulsory process clause as granting the defendant the right to subpoena witnesses in his favor to appear in court.¹⁴ However, in *Washington v. Texas*, the Supreme Court was called upon to decide whether compulsory process "guarantees a defendant the right under any circumstances to put his witnesses on the stand, as well as the right to compel their attendance in court."¹⁵ The Court held that a Texas statute arbitrarily denying persons charged as principals, accessories, or accomplices in the same crime the right to each other's relevant and material testimony at trial violated the defendant's compulsory process rights.¹⁶ The Court noted that the Constitution could not have intended to give the defendant the right to secure the attendance of witnesses whose testimony he would have no right to use.¹⁷ Though *Washington* did not resolve the problem of "testimonial privilege"¹⁸ versus compulsory process, this issue must be addressed if the defendant's sixth amendment rights are to be fully recognized.¹⁹

7. "[T]o have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

8. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

9. The applicable portion of the fourteenth amendment states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV.

10. 380 U.S. 400 (1965).

11. 388 U.S. 14 (1967).

12. See Westen, *supra* note 6, at 74.

13. *Id.*

14. *Id.*

15. 388 U.S. at 19.

16. *Id.* at 23.

17. *Id.*

18. The Court, noting that its decision did not address the problem of testimonial privilege, stated, "Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privileges against self-incrimination . . . based on entirely different considerations from those underlying the common-law disqualifications for interest." 388 U.S. at 23 n.21.

19. See, e.g., Westen, *supra* note 6, at 166-70.

The testimonial privilege problem arises when the self-incrimination clause of the fifth amendment is invoked by a witness from whom the defendant seeks to compel testimony. This situation is most commonly encountered when, as in *Washington*, a defendant seeks the testimony of an alleged co-participant in the crime in presenting his defense. The co-participant validly claims his privilege against self-incrimination, and what might initially appear to be an irreconcilable conflict arises. The conflict can be avoided, however, through the use of immunity.

Immunity has been defined as "a state grant of amnesty in exchange for information."²⁰ Congress recognized that the government's need to obtain evidence in criminal prosecutions often conflicts with a person's right against self-incrimination.²¹ To reconcile this conflict, Congress allows the government to compel needed testimony by granting immunity to a witness in exchange for his testimony.²² This pro-

20. McLane, *Immunity: A State Grant of Amnesty*, 17 CRIM. L. BULL. 234, 235 (1981).

21. See generally Foytack, *Granting Immunity to Compel Testimony: Protection or Illusion?*, 3 CRIM. JUST. J. 151 (1979).

22. 18 U.S.C. §§ 6002, 6003 (1976) read as follows:

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

- (1) a court or grand jury of the United States,
 - (2) an agency of the United States, or
 - (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
- and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney

cedure allows the government to obtain needed evidence in carrying out its prosecutorial and investigatory functions without violating the privilege against self-incrimination.

Historically, the government was given the power to grant "transactional" immunity²³ to a witness, awarding him "full protection from prosecution for offenses to which the compelled testimony [related]"²⁴ and totally isolating him from criminal sanction.²⁵ Presently, however, the government is empowered to grant "use" immunity²⁶ to its witnesses. Use immunity, unlike transactional immunity, only protects the witness from subsequent prosecution using the compelled testimony and its fruits.²⁷ The government can later prosecute the witness by using evidence obtained from a source wholly independent of the compelled testimony.²⁸ Thus, the prosecution is given statutory authority to compel testimony in its favor by granting "use" immunity to a witness, while satisfying the requirements of the fifth amendment privilege against self-incrimination.²⁹ Further, as one commentator has aptly stated, "Unless the defendant can be distinguished from the prosecution in significant ways, the defendant has a presumptive right to obtain use immunity for his witness on an equal basis with the prosecution."³⁰ In fact, the compulsory process clause has been interpreted to grant the defendant a constitutional right to obtain use immunity for defense witnesses in order to present his case.³¹ The Supreme Court's opinion in *Kastigar v. United States*³² supports a compulsory process right to use immunity for a defendant.

In *Kastigar*, the Court held that "the immunity provided by [the congressional act] leaves the witness and the prosecutorial authorities

General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

23. See generally Foytack, *supra* note 21, at 156-58.

24. McLane, *supra* note 20, at 236-37.

25. McLane, *supra* note 20, at 236.

26. See generally Foytack, *supra* note 21, at 156.

27. See McLane, *supra* note 20, at 236-37.

28. *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

29. See 18 U.S.C. §§ 6002, 6003, quoted in note 22, *supra*.

30. Westen, *supra* note 6, at 168.

31. See *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980); *U.S. v. Herman*, 589 F.2d 1191 (3d Cir. 1978).

32. 406 U.S. 441 (1972).

in substantially the same position as if the witness had claimed the fifth amendment privilege. The immunity therefore is co-extensive with the privilege and suffices to supplant it."³³ *Kastigar* recognized that the government need not grant full amnesty to a witness in exchange for his incriminating testimony. Since a grant of "use" immunity leaves the prosecution in "substantially the same position"³⁴ as if the fifth amendment privilege had not been asserted, the government should not have a valid objection to giving the defendant the same power to compel testimony by a grant of use immunity. In either case, absent the grant of immunity, the testimony would not be available for the court's consideration.

The government's primary argument against allowing the defendant the right to obtain use immunity in his favor is its present and future interest in prosecuting the potential defense witness.³⁵ The defendant's right to compel testimony favorable to his case is often subordinated to the government's interest in subsequent prosecution of the witness.³⁶ Defense witness immunity raises the issue of whose interest is to prevail: the government's or the defendant's?

In *Roviaro v. United States*,³⁷ the Supreme Court faced the issue of whether the government's privilege to withhold an informer's identity outweighed the defendant's right to present his defense. The government's informer was the only person who would testify concerning the defendant's knowledge of a particular aspect of the crime.³⁸ The government refused to disclose the informer's identity, effectively precluding the defendant from presenting his defense. In upholding the defendant's request for the informer's identity, the court balanced the public's interest in protecting the free flow of information against the defendant's right to present an effective defense.³⁹ Since

33. *Id.* at 462.

34. *Id.*

35. See Flanagan, *Compelled Immunity for Defense Witnesses: Hidden Cost and Questions*, 56 NOTRE DAME LAW. 447, 461-63 (1981); Comment, *Defense Witness Immunity and the Right to a Fair Trial*, 129 U. PA. L. REV. 377, 391-98 (1980); Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51, 71-76 (1977).

36. See generally Westen, *supra* note 6, at 167-68.

37. 353 U.S. 53 (1957).

38. In *Roviaro*, the defendant was charged with selling heroin to a government informer. The informer's testimony "might have disclosed an entrapment . . . might have thrown doubt upon petitioner's identity or on the identity of the package [sold] . . . [or] might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported'" *Id.* at 64.

39. *Id.* at 62.

the informer's identity was crucial to the defendant's case,⁴⁰ due process demanded that the informer's identity be revealed.⁴¹

In *Davis v. Alaska*,⁴² the government's interest in protecting juvenile offenders conflicted with the defendant's right to confront the witness presented against him.⁴³ The state sought to prohibit the introduction of a juvenile probation record⁴⁴ by defense counsel in cross-examining the adverse witness.⁴⁵ The Supreme Court upheld the "petitioner's right to probe into the influence of possible bias . . . of a crucial identification witness," concluding that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender."⁴⁶

In *Davis*, the defendant's constitutional right to confrontation prevailed over the government's interest; in *United States v. Nixon*,⁴⁷ the Court expanded this protection to include the right to compulsory process.⁴⁸ In *Nixon*, the President of the United States sought to quash the subpoena *duces tecum* issued by a district court at the request of the Watergate special prosecutor.⁴⁹ The subpoena ordered the production of several tape-recorded conversations between President Nixon and certain criminal defendants.⁵⁰ The president refused to produce the tapes, claiming an absolute executive privilege from federal subpoena in criminal prosecutions.⁵¹ The Court refused to recognize

40. The Court, noting the importance of the witness, stated, "Unless petitioner waived his constitutional right not to take the stand in his own defense, [informer] was his one material witness [T]he sole participant, other than the accused, in the transaction charged [T]he only witness in a position to amplify or contradict the testimony of government witnesses." *Id.* at 64.

41. The Court stated that prejudicial error had occurred when the government was permitted to withhold the informer's identity from the defendant. *Id.* at 65.

42. 415 U.S. 308 (1974).

43. "The tension between the right of confrontation and the State's policy of protecting the witness with a juvenile record is particularly evident" *Id.* at 314.

44. At the time of the trial, the witness was on "probation by order of a juvenile court after having been adjudicated a delinquent for burglarizing two cabins." *Id.* at 311.

45. In *Davis*, the prosecution's crucial witness was a juvenile who testified as to the defendant's involvement in the crime. Prior to his testifying, the prosecutor "moved for a protective order to prevent any reference to [the] juvenile record by the defense in the course of cross-examination." The defense sought to introduce the record to probe for possible bias and prejudice, to show the witness "acted out of fear or concern of possible jeopardy to his probation." *Id.* at 310-11.

46. *Id.* at 319.

47. 418 U.S. 683 (1974).

48. *Id.* at 708-09, 713.

49. *Id.* at 687-88.

50. See *Id.* at 687 n.3 & 688.

51. *Id.* at 706.

an absolute executive privilege,⁵² holding that a general executive privilege prevails over judicial duty only upon a specific showing of need by the executive branch.⁵³ As to the defendant's compulsory process right to obtain evidence, the Court stated, "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."⁵⁴

The *Nixon* court emphasized the defendant's right to have all relevant and material evidence presented at trial, to insure that judgments are not "founded on a partial or speculative presentation of the facts."⁵⁵ The very integrity of our judicial system depends upon a full presentation of facts, within the framework of the rules of evidence, at every criminal trial.⁵⁶ The sixth amendment compulsory process clause guarantees the defendant the right to present all evidence relevant and material to his defense.

The right to present a defense has also been protected by the due process clause of the fifth amendment. In *Brady v. Maryland*,⁵⁷ the prosecution suppressed the confession of the defendant's co-participant in the crime.⁵⁸ The accused was tried, convicted, and sentenced, and the conviction was affirmed by the Maryland Court of Appeals, before the exculpatory evidence was brought to the trial court's attention.⁵⁹

52. The Court concluded "that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality . . . [t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713.

53. The Court stated, with reference to a presidential showing of need:

Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

Id. at 706. See note 52, *supra*.

54. *Id.* at 708-09 (emphasis added).

55. *Id.* at 709.

56. *Id.*

57. 373 U.S. 83 (1963).

58. In *Brady*, the defendant was tried separately from his co-defendant in the case. At his trial, the defendant admitted participating in murder, but claimed his companion did the actual killing. Prior to trial, the defendant requested his companion's extra-judicial statements from the prosecution. Several statements were shown to him; however, the statement in which his companion admitted the actual killing was not. *Id.* at 84.

59. *Id.*

The Supreme Court held that the defendant's due process rights had been violated by the government's suppression of requested evidence material to his case.⁶⁰

In *Brady*, the defendant's right to present evidence material to his case was protected from *prosecutorial* interference, while in *Chambers v. Mississippi*,⁶¹ the defendant's right to present exculpatory evidence was protected from *statutory* interference. In *Chambers*, the defendant was denied the right to cross-examine a witness⁶² by a state rule of evidence.⁶³ Another state rule of evidence also prevented Chambers from presenting exculpatory evidence at trial.⁶⁴ The Supreme Court reversed Chambers' conviction and required a new trial with the exculpatory testimony admitted into evidence.⁶⁵

Constitutionally, the defendant cannot arbitrarily be denied relevant,⁶⁶ material,⁶⁷ or exculpatory⁶⁸ evidence by the government in a criminal prosecution. In certain circumstances, the fifth amendment privilege against self-incrimination asserted by a witness denies the defendant relevant, material, or exculpatory evidence favorable to his case. Compulsory process could be interpreted to give the defendant the right to such evidence through a grant of use immunity.

60. "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

61. 410 U.S. 284 (1973).

62. The witness sought to be examined by the defendant had given a sworn confession to the defendant's attorneys that he, rather than the defendant, had killed the victim. The witness also admitted telling one of his friends that he had shot the victim. The defense put the witness on the stand at trial to introduce his sworn confession; however, the prosecutor on cross-examination elicited the fact that the witness had repudiated his confession at an out-of-court hearing. The defense moved to examine the witness on cross-examination, claiming he was now an adverse witness. The trial court denied the defendant's motion. *Id.* at 291.

63. The trial court denied the defendant's motion to cross-examine his own witness based upon the state's "voucher" rule. The rule prevented a party from impeaching his own witness, based upon the assumption that a party who calls a witness "vouches for his credibility." *Id.* at 295-96.

64. The defendant also sought to introduce the testimony of three other men who would testify that the witness told them he had committed the murder. The trial judge refused to allow the introduction of this evidence; he based his decision upon the state's hearsay rule. *Id.* at 294, 298.

65. The Court held that "[t]he hearsay rule [could] not be applied mechanistically to defeat the ends of justice . . . [U]nder the facts and circumstances of this case . . . the trial court [had] deprived [the defendant] of a fair trial." *Id.* at 302-03.

66. *Roviaro v. United States*, 353 U.S. at 63-64.

67. *Washington v. Texas*, 388 U.S. at 23.

68. *Chambers v. Mississippi*, 410 U.S. at 297, 303.

While the Supreme Court has not ruled on claims for defense witness immunity, circuit courts have almost uniformly rejected such claims.⁶⁹ The Third Circuit, however, has recognized the defendant's right to claim defense witness immunity.⁷⁰ In *United States v. Morrison*,⁷¹ the Third Circuit held that due process demands that use immunity be granted to a defense witness when prosecutorial misconduct occurs.⁷² The court protected the defendant's rights by ordering the prosecution to either grant use immunity or accept a judgment of acquittal.⁷³

While *Morrison* was decided under the due process clause, the next Third Circuit case, *Virgin Islands v. Smith*,⁷⁴ appeared to be based upon the compulsory process clause.⁷⁵ In *Smith*, the Third Circuit gave

69. See, e.g., *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982); *United States v. Lowell*, 649 F.2d 950 (3d Cir. 1981); *United States v. D'Apice*, 664 F.2d 75 (5th Cir. 1981); *United States v. Herbst*, 641 F.2d 1161 (5th Cir. 1981); *United States v. Davis*, 623 F.2d 188 (1st Cir. 1980); *Grochulski v. Henderson*, 637 F.2d 50 (2d Cir. 1980); *United States v. Horwitz*, 622 F.2d 1101 (2d Cir. 1980); *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980); *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980); *United States v. Lenz*, 616 F.2d 960 (6th Cir. 1980); *United States v. Klauber*, 611 F.2d 512 (4th Cir. 1979); *United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978); *United States v. Saettele*, 585 F.2d 307 (8th Cir. 1978); *United States v. Carman*, 577 F.2d 556 (9th Cir. 1978); *United States v. Smith*, 542 F.2d 711 (7th Cir. 1976); *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976).

70. In *Virgin Islands v. Smith*, 615 F.2d 964, 973-74 (3d Cir. 1980), the court held, "[I]n cases where the government can present no strong countervailing interest, a court has inherent authority to immunize a witness capable of providing clearly exculpatory evidence on behalf of a defendant who has met our stated conditions."

71. 535 F.2d 223 (3d Cir. 1976).

72. In *Morrison*, the Assistant United States Attorney sent messages to the defense witness warning her of possible prosecution if she testified. He also warned her of possible prosecution for perjury if she testified. A subsequent personal interview with the Assistant United States Attorney intimidated her to such an extent that she refused to answer some thirty questions at trial for fear of self-incrimination. The defendant claimed he was denied vital evidence by the intimidating tactics of the prosecuting attorney. *Id.* at 225-227.

73. *Id.* at 229.

74. 615 F.2d 964 (3d Cir. 1980).

75. *Smith* involved a situation in which the defendant sought to introduce an inculpatory statement of a witness who refused to testify for fear of self-incrimination. The statement indirectly exculpated the defendant; however, the trial judge refused to allow the statement introduced into evidence. Defense counsel sought use immunity for the witness; this was also refused by the trial judge. There was some question as to whether prosecutorial misconduct occurred because the United States Attorney refused to concur in the Virgin Island Attorney General's agreement to grant use immunity to the witness. The Attorney General's office had predicated the grant of immunity upon the United States Attorney's consent, and there was no reason given for the refusal by the United States Attorney's office. The court appeared to base

federal judges the power to grant "a judicially fashioned"⁷⁶ immunity to protect the defendant's right to present an effective defense.⁷⁷ *Smith* conditioned this immunity upon the satisfaction of six requirements by the defendant:

- (1) The immunity must be properly sought in the district court;
- (2) The defense witness must be available to testify;
- (3) The testimony must be essential in nature;
- (4) There must be no strong countervailing governmental interest;
- (5) The testimony must be clearly exculpatory;
- (6) The testimony must not be ambiguous, circumstantial, or related solely to the credibility of the government's witness.⁷⁸

Smith has been severely criticized by other circuits,⁷⁹ and most circuits have refused to follow it.⁸⁰

In *United States v. Herbst*,⁸¹ the Fifth Circuit refused to grant immunity at the defendant's request,⁸² noting that *Smith* was a minority view and that even if the court were inclined to follow it, an adequate showing had not been made in that case.⁸³ The court in *Herbst* refused to decide whether in some instances due process or compulsory process demand that use immunity be granted to a defense witness,

its remand of the case to determine if use immunity should be granted to the witness upon the compulsory process clause of the sixth amendment. The court defined *judicial immunity* as court authority to grant immunity to a defense witness to effectuate a defendant's compulsory process rights. In *Smith*, the defendant was denied exculpatory testimony and therefore was unable to present an effective defense. *Id.* at 966-70.

76. *Id.* at 969.

77. *Id.*

78. *Id.* at 972-74.

79. The Second Circuit in *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), characterized *Smith* as "a totally bizarre situation" and urged trial judges to "summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution." 623 F.2d at 773, 777-78. The Fifth Circuit, in *United States v. Herbst*, 641 F.2d 1161 (5th Cir. 1981), declined to "follow the Third Circuit in fashioning a doctrine of judicial use immunity. . . . [T]he Virgin Islands case is clearly the minority view." 641 F.2d at 1168.

80. See generally *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982); *United States v. D'Apice*, 664 F.2d 75 (5th Cir. 1981); *United States v. Lowell*, 649 F.2d 950 (3d Cir. 1981); *United States v. Herbst*, 641 F.2d 1161 (5th Cir. 1981); *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980); *Grochulski v. Henderson*, 637 F.2d 50 (2d Cir. 1980); *United States v. Horwitz*, 622 F.2d 1101 (2d Cir. 1980); *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980); *United States v. Lenz*, 616 F.2d 960 (6th Cir. 1980).

81. 641 F.2d 1161 (5th Cir. 1981).

82. *Id.* at 1169.

83. *Id.* at 1168.

noting that the Fifth Circuit had never been called upon to decide this issue.⁸⁴

In *United States v. D'Apice*,⁸⁵ the defendant refused to testify at a co-defendant's trial⁸⁶ after having been granted use immunity by the district court over the prosecution's objection.⁸⁷ D'Apice previously had agreed to testify if he was granted use immunity and was tried before his co-defendant.⁸⁸ The Fifth Circuit refused to follow the trial court and denied the grant of use immunity;⁸⁹ however, the constitutional issues⁹⁰ were not presented to the court.

The first case to clearly present the constitutional issues⁹¹ to the court was *United States v. Thevis*.⁹² In *Thevis*, the Fifth Circuit denied the due process claim to use immunity,⁹³ holding that due process does not require a grant of use immunity to a defense witness simply because the witness has exculpatory information unavailable from other sources.⁹⁴ The court in *Thevis* left to Congress the decision of whether use immunity should be used to abrogate the fifth amendment privilege against self-incrimination.⁹⁵ The compulsory process

84. *Id.* at 1169.

85. 664 F.2d 75 (5th Cir. 1981).

86. *Id.* at 76.

87. The district court was prepared to grant the request for use immunity, after having asked government attorneys if they would apply for statutory immunity under 18 U.S.C. §§ 6001, 6003. The government refused, and the court announced that use immunity would be granted to the defense witness. The government then notified the court that if the defendant testified, his testimony would not be used against him in a subsequent prosecution. *Id.* at 76.

88. The defendant stated under oath that he was willing to testify if granted use immunity and a trial date before his co-defendant's. At a co-defendant's trial, the defendant refused to testify, claiming that the trial court's conferral of use immunity was void and the government's promise not to use his testimony against him was not binding outside the district. *Id.* at 76.

89. *Id.* at 77.

90. The constitutional issues were defined by the court as whether the co-defendant requesting use immunity was denied the constitutional rights to a fair trial and to compulsory attendance of witnesses. *Id.* at 77.

91. The constitutional issues were defined by the Fifth Circuit in *United States v. D'Apice*, 664 U.S. 75, 77 (5th Cir. 1981), and *United States v. Herbst*, 641 F. 1161, 1169 (5th Cir. 1981), as the due process right to a fair trial and the compulsory process right to present a defense.

92. 665 F.2d 616 (5th Cir. 1982).

93. *Id.* at 639, 641.

94. *Id.* at 639.

95. The court agreed that the immunity decision required a balancing of public interests, but concluded that "the potential interference [with important public interests] is nevertheless great enough that the legislature, rather than the courts, should decide on such a course." *Id.* at 640.

argument was not raised in *Thevis*;⁹⁶ however, recently the Fifth Circuit answered the compulsory process argument in *United States v. Chagra*.⁹⁷

In *Chagra*, the appellant asked the trial court to grant use immunity to a witness implicated in the crime by the testimony of a government witness. The district court refused to grant use immunity or to order the government to do so.⁹⁸ In upholding the trial court's decision, the court noted, "We do not believe that the compulsory process clause supports the appellant's position [that he was denied a fair trial by the court's refusal to grant use immunity]."⁹⁹

In answering the compulsory process claim, the Fifth Circuit noted that the text of the clause,¹⁰⁰ the history of the clause,¹⁰¹ the case law interpreting the clause,¹⁰² and the "right to present a defense"¹⁰³ fail to support the appellant's claim for defense witness immunity.

The court, however, appeared to limit its decision in *Chagra* to the specific facts of the case, stating, "In conclusion, under the present circumstances, we can find no constitutional basis for the defendant's right to demand that the government offer transactional or use

96. The court's reference only to the due process argument implies that the compulsory process argument either was not addressed by the court or was not raised by the parties. *Id.* at 639.

97. 669 F.2d 241 (5th Cir. 1982).

98. *Id.* at 258.

99. *Id.* at 259.

100. The court interpreted the language of the clause as preserving "a defendant's common law right to subpoena witnesses for his defense at trial . . . [The] clause does not suggest a right to supersede a witness' invocation of his own fifth amendment privilege . . ."; *Id.* at 259-60. *But cf.* *Washington v. Texas*, 388 U.S. 14 (1967), where the Supreme Court noted "that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court" 388 U.S. at 22. *See* note 11, *supra*, and accompanying text.

101. "[H]istory demonstrates . . . that the clause was designed to ensure that a defendant would have the subpoena power available for his defense rather than to guarantee a defendant the unlimited right to present a defense . . ." 669 F.2d at 260. *But see* note 54, *supra*, and accompanying text.

102. The court noted that compulsory process cases had dealt with governmental rules of evidence designed to exclude unreliable testimony and the government's refusal to provide evidence based upon a claim of privilege. The court distinguished the present case because the case involved the fifth amendment privilege against self-incrimination, which was designed to "exclude even highly reliable evidence in order to promote social goals." The court also noted that the present case involved a witness interposing a claim of privilege between himself and the defendant, rather than between himself and the government. 669 F.2d at 260.

103. *Id.* at 260. *But see* *Washington v. Texas*, 388 U.S. 14 (1967); *United States v. Nixon*, 418 U.S. 683 (1974).

immunity to his witness."¹⁰⁴ It should be noted that there is no indication in the decision as to the material or exculpatory nature of the testimony sought by the appellant. The defense merely wanted to question him concerning his knowledge of and participation in the crime.¹⁰⁵ The Fifth Circuit reiterated the position taken in *Thevis* that "the federal constitution may in some extraordinary circumstances require either defense witness immunity or some remedial action by a district court to protect a defendant's right to a fair trial."¹⁰⁶ The *Chagra* case did not present such circumstances.

The appellant also had asked the district court to grant use immunity under the federal immunity statutes,¹⁰⁷ claiming the court's refusal to do so violated his right to a fair trial. Compulsory process, however, guarantees the defendant the right to present a defense, not the right to force the court to grant use immunity under the federal statutes. Compulsory process should guarantee the defendant the right to request that material, exculpatory testimony be admitted through a grant of use immunity by the trial court when the witness has invoked a valid fifth amendment claim of privilege.

In Louisiana, the right to defense witness immunity was raised for the first time in a concurring opinion by Justice Lemmon, in *State v. Bice*.¹⁰⁸ The defendant sought to introduce the testimony of a co-participant in the case; however, the witness refused to testify, claiming his privilege against self-incrimination. Both the defense counsel and the prosecutor believed the witness to be in possession of exculpatory testimony.¹⁰⁹ The defendant was convicted without the introduction of the testimony;¹¹⁰ however, the supreme court reversed and remanded the case to the trial court to determine the content of the testimony.¹¹¹ In his concurring opinion, Justice Lemmon pointed

104. 669 F.2d at 261.

105. *Id.* at 258.

106. 669 F.2d at 258.

107. See note 22, *supra*.

108. 390 So. 2d 1270 (La. 1980).

109. In *Bice*, the defendant sought to introduce testimony that he had "helped in the planning, but did not directly participate in the assault on the victim." The witness, who had charges pending against him, refused to testify for fear of self-incrimination. *Id.* at 1271.

110. *Id.* at 1270-71.

111. The defendant applied to the trial court for a new trial hoping to place the evidence before the jury on "a claim for newly discovered evidence." The trial judge denied the motion, but the supreme court remanded the case for a rehearing on the motion. The trial court was instructed to "determine in the context of the entire record whether [the] testimony is so compelling that it ought to produce a different result before a different jury." *Id.* at 1272. Upon remand, the witness invoked his privilege against self-incrimination, "justifying his refusal on grounds of a recent habeas peti-

to the fundamental unfairness of the prosecution's effectually precluding testimony favorable to the accused by placing the defense witness in a position where, by giving his testimony, he must incriminate himself.¹¹²

In *State v. Wilson*,¹¹³ the Louisiana Supreme Court was faced with a compulsory process violation when the prosecutor and the trial judge interrupted defense counsel's direct examination of a witness.¹¹⁴ The witness claimed his privilege against self-incrimination and was allowed to leave the witness stand without answering any further questions.¹¹⁵ The supreme court ordered a new trial to allow defense counsel to question the witness on matters not within the scope of his privilege against self-incrimination.¹¹⁶ A majority of the court refused to address the issue of defense witness immunity since the issue was not squarely before them. Justice Lemmon, in his concurring opinion, however, noted that defense witness immunity could be one solution to the problem presented in the case.¹¹⁷

In the instant case, the issue of defense witness immunity was presented squarely to the supreme court.¹¹⁸ Mattheson sought to introduce testimony crucial to his case;¹¹⁹ he was prevented from doing so by a witness' valid claim of fifth amendment privilege. Defense counsel sought to obtain the testimony through a judicial grant of use immunity.¹²⁰ The evidence Mattheson sought to introduce pertained to his mental state at the time of the crime and possibly to the "sequence of events which culminated in the shooting"¹²¹ of the victim.

tion filed in his behalf." Upon appeal to the supreme court, the trial court's refusal to grant a new trial was upheld. *State v. Bice*, 407 So. 2d 1234, 1236-37 (La. 1982).

112. 390 So. 2d at 1272.

113. 394 So. 2d 254 (La. 1981).

114. Defense counsel's direct examination of the witness was interrupted by the trial judge and the prosecutor to inform the witness of his fifth amendment privilege against self-incrimination. *Id.* at 257.

115. *Id.*

116. *Id.* at 259.

117. *Id.*

118. *State v. Mattheson*, 407 So. 2d 1150, 1160-61 (La. 1981).

119. The witness' attorney, out of the presence of the jury, testified that he believed the witness to be in possession of information exculpatory as to any intent of the defendant to kill during the perpetration of the crime. This evidence was crucial to the defendant's case, considering the prosecution's comments intimating that the defendant had gone to the salon to kill everyone present but did not have enough ammunition. Brief for defendant at 5, 10; *State v. Mattheson*, 407 So. 2d 1150 (La. 1981).

120. 407 So. 2d at 1160-61.

121. [T]he defendant testified that he was both intoxicated and under the influence of LSD at the time of the incident. His version of the incident was that the receptionist had poked at the gun. . . . and that it had gone off as she grabbed for

The witness, Mattheson's wife, was the only person who could possibly testify concerning his mental state at the time of crime.¹²²

Mattheson sought to prove that he did not have the requisite "specific intent" required for a conviction of first-degree murder because he had taken LSD and had consumed a large amount of alcohol before the commission of the crime.¹²³ As Mattheson's constant companion, the witness was the only person who could testify as to the amount of alcohol he may have consumed or the drugs he may have taken. The witness was also the only actual eyewitness to the shooting of the victim. The state presented two witnesses at trial who testified that the deceased had not lunged or moved toward Mattheson in any way prior to the shooting, as Mattheson had claimed.¹²⁴ There was evidence, however, that due to the layout of the interior of the building, the witnesses' view may have been distorted.¹²⁵ Mattheson was unable to rebut the testimony of the state's witnesses or to substantiate his own claim without his wife's testimony. The evidence Mattheson sought to introduce was believed to be exculpatory as to the first-degree murder charge¹²⁶ and material to his defense, as the witness was the only person who could testify as to what actually happened at the time of the shooting. Such material and exculpatory evidence is precisely the type of evidence that compulsory process demands be introduced.

In upholding the trial court's refusal to grant use immunity to the defense witness, the supreme court construed the compulsory process clause as guaranteeing "the right [of a defendant] to bring his witness to court, and have the witness' non-privileged testimony heard,"¹²⁷ but not the right to displace the privilege against self-

it He had no witness to call other than his wife [to corroborate his testimony]

. . . .
Brief for defendant at 10; State v. Mattheson, 407 So. 2d 1150 (La. 1981).

122. *Id.*

123. 407 So. 2d at 1155-56.

124. One witness testified "that she did not see [the victim] lunge at defendant or move at any time prior to being shot." The second witness "testified that she did not see [the victim] grab the gun and the victim was not moving at the time of the shooting." *Id.* at 1170 (Calogero, J., dissenting).

125. "According to the witnesses who were in the beauty shop, the working area is located up a few steps from the level at which the [victim] was working. Consequently, people on the upper level might have a distorted or incomplete view of what occurs on the lower level." One witness testified that she saw the events "all together" and not in any sequence prior to the shooting; and the other witness was located upon the upper level. *Id.* at 1170 (Calogero, J., dissenting).

126. See note 121, *supra*, and accompanying text.

127. 407 So. 2d at 1160-61.

incrimination. The court interpreted the right to present a defense as the right to testimony not protected by the fifth amendment privilege against self-incrimination. In limiting a defendant's compulsory process rights by the privilege against self-incrimination, the court failed to recognize that both rights could be protected by granting the defendant the right to obtain use immunity.

The supreme court also failed to make a distinction between article I, § 16 of the Louisiana Constitution, granting the "right to present a defense,"¹²⁸ and the sixth amendment to the United States Constitution.¹²⁹ The Louisiana Supreme Court noted only that article I, § 16 had never been construed to grant a right to defense witness immunity.¹³⁰ It is submitted that this is too limited a view. Article I, § 16 of the Louisiana Constitution is more specific than the sixth amendment to the United States Constitution. The latter grants a defendant the right to compulsory process, which is *interpreted* as the right to present a defense,¹³¹ while the Louisiana Constitution specifically enumerates the right to present a defense, as well as the rights of confrontation and compulsory attendance of witnesses.¹³² It is submitted that article I, § 16 of the Louisiana Constitution was intended to give the defendant greater rights than he would have under the United States Constitution, thus giving the defendant the right to material and exculpatory evidence through a grant of use immunity.

The state can compel testimony favorable to its case under article 439.1 of the Louisiana Code of Criminal Procedure;¹³³ the defen-

128. Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense and to testify in his own behalf.

LA. CONST. art. I, § 16.

129. See note 4, *supra*.

130. 407 So. 2d at 1160-61.

131. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

132. See note 128, *supra*.

133. LA. CODE CRIM. P. art. 439.1 reads,

A. In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a grand jury of the state, at any proceeding before a court of this state, or in response to any subpoena by the attorney general or district attorney, the judicial district court of the district in which the proceeding is or may be held shall issue, in accordance with Subsection B of this article, upon the request of the attorney general together with the district attorney for such district,

dant, under *Mattheson*, is denied such a right. If the government can obtain use immunity to prosecute the guilty, the defendant ought to be granted the same right to exonerate the innocent, namely himself.¹³⁴ If the defendant's right to present a defense is limited to the right to testimony not protected by the privilege against self-incrimination, criminal trials become a "search for the truth"¹³⁵ without means to obtain all the material facts. It is submitted that, under certain circumstances, defendants ought to have the power to compel testimony in their favor, over government objection, by a judicial grant of use immunity.

Interest in subsequent prosecution of the witness appears to be both the government's main objection to use immunity and the basis for the court's decision in *Mattheson*. The court will deem the trial judge correct in rejecting claims for defense witness immunity when, as in *Mattheson*, the witness is an actual or potential target of prosecution.¹³⁶ As a result, *Mattheson* may be construed as giving the defendant the right to obtain use immunity for a witness when the witness has pled guilty, been convicted, or had the charges against him dropped. Further, the court's opinion may be interpreted to give the defendant the right to obtain use immunity if substantial prejudice or prosecutorial misconduct occurs.¹³⁷ The majority of cases where

an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in Subsection C of this article.

B. The attorney general together with the district attorney may request an order under Subsection A of this article when in his judgment

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self incrimination.

C. The witness may not refuse to comply with the order on the basis of his privilege against self-incrimination, but no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

D. Whoever refuses to comply with an order as hereinabove provided shall be adjudged in contempt of court and punished as provided by law.

134. See Note, *supra* note 35, at 70.

135. But cf. *United States v. Turkish*, 623 F.2d 769, 775 (2d Cir. 1980). The court acknowledges the need for important facts shielded from disclosure by a lawful privilege; however, the court views the substantial obstacles to successful prosecution of the protected witness and the possibility of inviting cooperative perjury among law violators as public concerns which outweigh the public interest in the pursuit of truth. *Id.* at 775.

136. 407 So. 2d at 1161.

137. *Id.* at 1160-61.

defense witness immunity is needed, however, involve co-participants who have charges pending against them. As such, the court's opinion gives defendants very little, if any, remedy.

The government strongly objects to giving defendants such a remedy for two reasons:

- (1) the impossibility of subsequent prosecution of a witness who has been granted use immunity;¹³⁸
- (2) the possibility that co-defendants will use immunity to exonerate each other at trial.¹³⁹

These are valid interests on the government's part; nevertheless, they are not compelling enough to prevent the defendant from exercising his compulsory process rights under certain limited circumstances. In *Kastigar v. United States*,¹⁴⁰ the Supreme Court upheld "use" immunity statutes allowing the government to prosecute immunized witnesses by proving that "the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."¹⁴¹ *Kastigar* prohibits the government from using the compelled testimony as an "investigatory lead"¹⁴² to gain evidence from the compelled testimony to use against the witness in a subsequent prosecution. The government argues that the *Kastigar* burden is too difficult to sustain in the subsequent prosecution of a *defense* witness because of the necessity of proving independent sources for all the evidence used.¹⁴³ Though the Supreme Court has not ruled on the burden of proof necessary to satisfy the *Kastigar* test, lower courts have held establishment by a preponderance of the evidence sufficient.¹⁴⁴ Thus, the government need not prove an "independent source" of the evidence used beyond a reasonable doubt, but only by a preponderance of the evidence.¹⁴⁵ The government agrees to sustain the *Kastigar* burden for its *own* immunized witnesses; however, it unfairly refuses to sustain the burden for immunized *defense* witnesses. *Kastigar* can

138. See sources cited in note 35, *supra*.

139. See *United States v. Turkish*, 623 F.2d 769, 775-76 (2d Cir. 1980).

140. 406 U.S. 441 (1972).

141. *Id.* at 460.

142. *Id.*

143. *Id.*

144. See Flanagan, *supra* note 35, at 458 n.83.

145. "Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it . . . [T]he fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1064 (5th ed. 1979). This is in contrast to the government's burden in criminal trials to prove the guilt or innocence of the accused "beyond a reasonable doubt" (*i.e.*, fully satisfied, entirely convinced, clear, precise, indubitable). BLACK'S LAW DICTIONARY 147 (5th ed. 1979).

be construed as guaranteeing the government access to all material and relevant evidence in possession of a "privileged"¹⁴⁶ witness, without giving up its right to subsequent prosecution. This right could easily be extended to the defendant who is in need of testimony crucial to his case in the possession of a "privileged" witness by granting him the power to obtain use immunity. The government would still have the right to prosecute the immunized witness, and the defendant would obtain possession of testimony crucial to his case.

If defendants are given the right to obtain use immunity for defense witnesses, the government's burden could be eased in two ways:

- (1) requiring the sealing and dating of all evidence obtained against the defense witness prior to the grant of immunity;¹⁴⁷
- (2) limiting the scope of the compelled testimony by the trial judge to give the prosecution greater freedom in investigating the defense witness.¹⁴⁸

The government then would need to prove only an "independent source" for any evidence obtained after the date the testimony was sealed, and since the scope of the testimony was limited, proving an independent source would be less burdensome. The more limited the scope of the testimony, the easier it is to prove the evidence used was not derived from the use of that testimony.

The government also contends that co-defendants granted use immunity will falsely accept sole responsibility for the crime, effectively exonerating each other. The government's fears are well-founded, but the problem of perjured testimony is one the courts face in every criminal trial and one they are well-equipped to handle.¹⁴⁹ The immunity statutes¹⁵⁰ specifically exclude perjured testimony from protection, enabling the government subsequently to prosecute the witness as if immunity had never been granted. The court should deal

146. "Privileged" in this context is taken to mean one who is in possession of information protected by the privilege against self-incrimination. U.S. CONST. amend. V.

147. See Comment, *supra* note 35, at 395.

148. But cf. Flanagan, *supra* note 35, at 457. It is submitted that limiting the witness' testimony to ease the government's burden of proving independent source is a viable solution. By limiting the scope of the immunized testimony, the government would have a less difficult problem proving the witness' testimony was not used as an investigatory lead for the evidence obtained. The government would then be forced to decide whether to enlarge the scope of the immunized testimony by impeaching the witness upon cross-examination.

149. See Note, *supra* note 35, at 81-82.

150. See notes 22 & 133, *supra*.

with the problem of the truthfulness of testimony as in any other criminal trial—a question of fact for the jury to decide.¹⁵¹ Jurors presently decide the credibility of immunized government witnesses and are therefore quite capable of judging the credibility of an immunized defense witness.

In *Mattheson*, the Louisiana Supreme Court apparently considered the government's interest in subsequent prosecution compelling enough to prevent the defendant from obtaining use immunity for his witness. The court could have granted Mattheson's request for use immunity. All the evidence obtained against the defense witness could have been sealed and dated prior to the grant of immunity. The trial judge could have limited the defense witness' testimony to only those facts concerning the defendant's mental state at the time of the crime and the chain of events occurring between the time the two entered the salon and the shooting of the victim.

The case should have been remanded to the trial court with appropriate standards for implementing defense witness immunity. It has been suggested that the model used in informer privilege cases¹⁵² could serve as a basis for the appropriate standards to review a grant of use immunity. Based upon the suggested procedures, the defendant would be required to request a grant of use immunity prior to the trial. If the prosecutor refused to concur in the request, an *ex parte*¹⁵³ hearing would be held to allow the defendant to prove that the testimony sought is material to his case and can not be obtained from any source but the prospective defense witness. The testimony would be deemed material if it would create a reasonable doubt as to the guilt or innocence of the defendant in the jury's mind.¹⁵⁴ All testimony submitted by the defendant would be sealed, dated, and kept confidential by the trial judge. If the defendant was prevented from making his request timely by circumstances beyond his control, the trial judge could allow the request to be made during trial at an *in camera*¹⁵⁵ evidentiary hearing. The procedures outlined above would be followed.

151. See Note, *supra* note 35, at 81-82.

152. See Note, *supra* note 35, at 80. The procedures developed by this author were derived from the suggested procedures of Helen M. McCue, the author of *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1977).

153. In an *ex parte* hearing, the court only hears one side of the controversy. *Ex parte* is defined as "on one side only" or "on application of one party." BLACK'S LAW DICTIONARY 517 (5th ed. 1979).

154. *United States v. Agurs*, 427 U.S. 97 (1976).

155. An *in camera* hearing is held in the judge's private chamber, not open to the public or the jury. BLACK'S LAW DICTIONARY 684 (5th ed. 1979).

The government, at either an *ex parte* or *in camera* hearing, would then have the opportunity to show that the grant of immunity would infringe upon its prosecutorial and investigatory functions. The government's evidence would be sealed, dated, and kept confidential. The trial judge would then decide whether to allow the grant of immunity based upon the defendant's showing of need, weighed against the government's showing of substantial prejudice to the prosecution of the witness. If the evidence sought by the defense was material to the defendant's case and available from a witness who agreed to testify under a grant of use immunity, the *trial judge* would grant the defendant's request for defense witness immunity. Following the grant of immunity, the witness would be compelled to testify as to what he knew, subject to cross-examination by the prosecution.

One of the aims of our criminal justice system is to insure a fair trial for the accused. As a former solicitor general has stated, "[T]he government wins its point when justice is done in its courts."¹⁵⁶ The defendant has a right to present his defense under the sixth amendment to the federal constitution and under article I, § 16 of the Louisiana Constitution. The defendant's right to material, relevant, and exculpatory testimony can be protected reasonably by granting the defendant the right to obtain use immunity when the appropriate standards are met. It is submitted that the defendant has a right to have his compulsory process rights protected; the use of defense witness immunity insures this right.

Louis S. Quinn, Jr.

156. *Brady v. Maryland*, 373 U.S. at 87 n.2, quoting from a statement made by Solicitor General Simon E. Sobeloff before the Judicial Conference of the Fourth Circuit on June 29, 1954. (Sobeloff was quoting Frederick William Lehmann, the previous Solicitor General).